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IN THE
Supreme Court of the United States

OCTOBER TERM, 1937.

No. [REDACTED]

56

KELLOGG COMPANY,

Petitioner,

against

NATIONAL BISCUIT COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT.

THOMAS D. THACHER,
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No.

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Petitioner,

AGAINST

NATIONAL BISCUIT COMPANY,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.**

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your petitioners respectfully pray that a writ of certiorari be issued to review the order (R. 3-A, p. 2285) of the Circuit Court of Appeals for the Third Circuit entered on May 5, 1938 pursuant to decision of that court (Buffington, Davis and Thompson, JJ.) rendered on that day

(R. 3-A, p. 2282) recalling and clarifying the mandate theretofore issued by said court pursuant to its order filed April 12, 1937 reversing the decree of the United States District Court for the District of Delaware herein. Said order of reversal also vacated and set aside the decree of said Circuit Court of Appeals of January 16, 1936 by which said court affirmed the decree of the District Court of the United States for the District of Delaware entered in the District Court on January 23, 1935 (R. 1, p. 228).

Following the order of reversal entered in the court below on April 12, 1937 and the denial of a petition and motion for reargument, petitioner filed in this Court a petition for certiorari to review said order of reversal which was denied by this Court October 25, 1937. Petitioner thereafter applied for reconsideration of its petition, which was denied by this Court November 8, 1937.

The cause now having been decided by the Circuit Court of Appeals under a decree and mandate substantially different from that heretofore sought to be reviewed in this Court, and reargument having been denied May 16, 1938 (R. 3-A, p. 2295), the petition for certiorari is renewed in order that this Court may in its discretion review the proceedings which have resulted in the decree of April 12, 1937, as modified by the decree of May 5, 1938.

Opinions Below.

The opinion of the United States District Court for the District of Delaware (R. 1, p. 193) was filed on January 11, 1935. It contains a statement of the essential facts found by the court in conformity with Equity Rule 70½ (R. 1, p. 228). It is not reported.

The per curiam opinion of the Circuit Court of Appeals affirming the final decree of the District Court (R. 3-A, p. 2069) was filed January 16, 1936, and is not reported.

The opinion of the Circuit Court of Appeals upon rehearing, reversing the judgment of the District Court

and vacating its decree affirming said judgment (R. 3-A, p. 2083) was filed April 12, 1937 and is reported in 91 F. (2d) 150.

The opinion of the Circuit Court of Appeals recalling and modifying its mandate (R. 3-A, p. 2282) was filed May 5, 1938, and is not yet reported.

Jurisdiction.

The jurisdiction to issue the writ requested is found in the provisions of Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A. Sec. 347(a)).

Questions Presented.

This case involves the right of the petitioner to manufacture and sell in competition with the respondent shredded wheat biscuits, the court below having enjoined the petitioner (1) from the use of the name "Shredded Wheat" as a trade name; (2) from advertising or offering for sale its product in the form and shape of plaintiff's biscuit; and (3) from doing either.

The questions presented are:

1. Whether the respondent is entitled to the exclusive use of the trade name "Shredded Wheat" when used to describe that well-known product, or otherwise;

2. Whether the respondent is entitled to the exclusive right to sell shredded wheat biscuits in a form and shape covered by expired patents; and

3. Whether the respondent is entitled to a perpetual monopoly in the use of the descriptive term shredded wheat biscuits and in the right to manufacture and sell its biscuits in a form and shape constituting the subject matter of expired patents.

Statement.

This action was commenced in the United States District Court for the District of Delaware. It was brought by the respondent, National Biscuit Company, to restrain the petitioner from the manufacture and sale of shredded wheat biscuits and from the use of that term to describe its product, on grounds of unfair competition and trademark infringement. After trial the bill of complaint was dismissed by the District Court upon findings of fact incorporated in its opinion (R. 1, p. 228).

In its first opinion (R. 3-A, p. 2070) the Circuit Court of Appeals approved the full and satisfactory discussion by the trial court of all the issues involved and stated that it found no occasion to write a further opinion, but with a view to avoiding needless repetition confined itself to stating that—

“on the expiration of plaintiff's patent No. 548,086, the exclusive right to make and sell the food product therein described ended. And on the expiration of plaintiff's design patent No. 24,688, the exclusive right to the designed biscuit also ceased.”

The Court added (R. 3-A, p. 2070):

“In that regard we agree with the Judge below, namely:

“In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word “shredded” and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or ‘palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and the case falls into the class of *expired patent cases* and is controlled by the *Singer case*.”

(*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169.)

The District Court found that up to 1915 plaintiff printed prominently upon packages containing its biscuit the following notice (R. 1, pp. 195-196):

"September 17, 1895, Patented October 15, 1895

"This Food, the process of making it and special machinery for its manufacture, are under the protection of the United States Government by virtue of many patents as follows:"

The notice was followed by a list of forty-one patents, including the design patent, which was declared invalid in 1908. With reference to this the District Court stated:

"Instead of removing the notice of the Perky design patent from the carton or otherwise notifying the public it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the Government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years" (R. 1, p. 197).

The court below in its first opinion stated that upon the expiration of the patents under which the product had become known to the trade and consumers by the descriptive words "shredded wheat":

"... the public could use the patented process both in making the patented product and in making it in the form described in the design patent, and in calling it 'shredded', provided in doing so it avoided simulating the product so as to prevent confusion and lead buyers into the belief they were buying plaintiff's product. This, in the judgment of the court below and of this court, the defendant has done in compliance with the requirements of *Singer v. June*, 163 U. S. 169, for the product of the defendant has at all times, in its cartons and otherwise, been marked with its own name, in words and colors (green and red) of such distinctive character, that buyers thereof knew they were getting defendant's product and were not buying that of the plaintiff. Moreover, it is clear

that the word 'shredded' was a descriptive word, aptly describing the process to which wheat grains were subject by any one using shredding or mangling in processing wheat grains" (R. 3-A, p. 2071).

The court below added that the word "shredded" was open to all shredders of wheat provided that they so used it as not to mislead and confuse the public (R. 3-A, p. 2071).

With reference to the question of confusion, the court below expressly stated:

"Now, that no confusion, misleading or deceit is shown in this case, is clear. In that regard we agree with the court's summary:

'Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.' " (R. 3-A, p. 2071).

The court below also adopted with approval the finding of the District Court as follows:

"The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent." (R. 3-A, p. 2072).

Insofar as these statements of the court below disclose facts, they adopt and approve the findings of the District Court.

After reargument the court below did not qualify or retract its approval of the findings of fact in the District Court, except that it did withdraw its conclusion that the words "shredded wheat" or "shredded wheat biscuit" were descriptive and held that whether descriptive or not they and the shape and form of the biscuit had by usage

following the expiration of the patents acquired a secondary meaning indicating manufacture by the respondent. It also changed its views regarding the design patent and because of its invalidity held that the case stood in equity as if there had been no patent (R. 3-A, p. 2088). Upon these premises the court below concluded that the respondent enjoyed the exclusive right to use this descriptive term and the characteristic form, although the District Court had found, and the court below had approved the finding, that there was no passing off or confusion in this case (R. 3-A, pp. 2071-72).

The record discloses that in 1912 respondent registered the picture of its factory as its trademark "For Shredded Wheat in Class 46, Foods and Ingredients of Foods", No. 89,071 (R. 4, p. 199). Respondent's present claim is that its trademark for shredded wheat is "Shredded Wheat". Its registration No. 89,071 states that "No claim is made herein to the words 'The home of shredded wheat' which appear above the factory picture". This is a double disclaimer of the words "shredded wheat",—first, by using the word to describe the product itself, and second, by disclaiming the words as part of the phrase "The home of shredded wheat". Respondent's predecessor also secured trademark registration No. 85,186 (R. 4, p. 197) on an alleged trademark showing one shredded wheat biscuit in a dish with a spoon and cream. The registration contains the following disclaimer: "no claim being made to the representation of a shredded wheat biscuit", applying the precise description to the precise illustration of the biscuit and, in effect, disclaiming both. Respondent's predecessor also procured registration 216,593 (R. 4, p. 205) for an alleged trademark consisting of a dish containing two of the characteristic biscuits in issue. The registration states that respondent's predecessor "disclaims any exclusive right to the representation of the two biscuits apart from the mark shown".

Comparison of respondent's carton (R. 1, p. 207) with petitioner's carton (R. 1, p. 215) shows no trademark

violation as to the bowl or plate which the District Court held the petitioner had a right to use (R. 1, p. 228).

The District Court found and the finding was not disturbed in the court below that the biscuits cannot be separately branded and marked (R. 1, p. 221).

The fact found in both courts is that there were not only design patents, but product and process patents as well, which secured to plaintiff a perfect monopoly of the business, including the form and shape which characterized the biscuit made with patented machinery (R. 1, pp. 196-197, 223; R. 3-A, p. 2070). This form and shape is inherent in the patented product and in the process of making it (R. 5, pp. 59-60) when the multiple-layer filaments are cooked in an oven (R. 1, pp. 196-197). The disclosure of these patents included machinery which could only be used in making biscuits in the form and shape in which plaintiff made and sold them (R. 5, pp. 12-13, Perky patent No. 532,286; pp. 84-85, Perky patent No. 614,338; p. 110, Perky patent No. 678,127). By virtue of these patents the respondent's predecessor in title enjoyed a complete monopoly of the form and shape which characterized the biscuit.

The Court in its second opinion referred to a legend upon some of the cartons used by the petitioner: "The original has this signature, W. K. Kellogg" (R. 3-A, p. 2092). This was not mentioned in the complaint. The answer contains a statement that the legend was used. There was no proof of the extent of its use beyond the statement in the answer, or of any confusion or deceit resulting from such use. The court below could not have considered the matter of any importance, since no injunction was directed against the use of the legend. The matter was not mentioned in the opinion of the District Court, nor in the first opinion of the court below. Of course, whatever the practice may have been, it could not justify the injunction directed by the court below, which prevents all sales however fairly the goods may be represented as the goods of petitioner.

Notwithstanding the facts the court below characterized the acts of the defendant as deliberately designed to acquire by unfair competition and misstatements trade which equitably belonged to the plaintiff. The court below not only granted the respondent a perpetual monopoly in the use of the descriptive terms "shredded wheat" and "shredded wheat biscuits" but also in the form and shape in which the biscuit had been patented.

Specification of Errors Relied Upon.

We respectfully submit that the court below erred—

1. In failing to affirm the decision of the District Court dismissing the complaint, and in reversing its judgment.
2. In holding that the respondent was entitled to the exclusive right to sell biscuits in the pillow-shape form under any name, and in enjoining petitioner from advertising or selling its product in the pillow-shape form in distinctive cartons.
3. In holding that the respondent was entitled to the exclusive use of the words "shredded wheat" as applied to food products, and in enjoining petitioner from the use of the words "shredded wheat" as a trade name.
4. In holding that respondent was entitled to the exclusive trademark use of the pictorial representation of two biscuits in a dish.
5. In holding that the name shredded wheat is not descriptive.
6. In awarding costs to respondent and directing an accounting for profits and damages.

7. In directing the issue of an injunction which in effect creates a perpetual monopoly in subject matter and descriptive name dedicated to the public upon the expiration of prior patent monopolies.

8. In failing to hold that by disclaimers in trademark registrations plaintiff's predecessor abandoned all claim of exclusive right, if any there was, to the words "shredded wheat" or "shredded wheat biscuit" as a trade name and to the shape, form, design, appearance or representation of the biscuit.

9. In holding that since the expiration of the patents the pillow-shape biscuit has acquired a secondary meaning, and in holding that this fact justifies the issuance of a perpetual injunction against the manufacture and sale of such biscuits without regard to the size of the biscuits or the distinctive containers in which they are sold.

10. In failing to dismiss the complaint in view of the lack of any evidence that petitioner's goods were ever passed off as respondent's goods, and in view of the finding that the size of petitioner's biscuits and the character of the containers in which they were sold were so distinctive as to preclude any sale of petitioner's goods as the goods of the respondent.

Reasons Relied upon for Allowance of the Writ.

(1) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960, in which respondent's predecessor was plaintiff.

In that case it was held that the long monopoly of the original manufacturer during the patent period created, as it was bound to create, an association in the public mind of the familiar wheat biscuit with a single, though

anonymous, maker, and that under these circumstances the manufacturer was entitled to some protection—"as much when the association be through mere appearances as when it be wrapped up in a name".¹

In considering what protection should be extended the court held in that case that so far as appearances of the biscuit were concerned the rule was "that minor, or 'non-functional' changes in appearance may be required, so long as the substantial elements are left in the public domain", but that "where the 'secondary meaning' is bound up in elements of the appearance which cannot be changed without cutting off the defendant's substantial right to make and sell that kind of goods the plaintiff must suffer the resulting confusion".

Characterizing these well established principles, for which many authorities were cited in the opinion, the Court said:

"Under the guise of protecting against unfair competition, we must be jealous not to create perpetual monopolies."

Applying these principles to that case which is an earlier edition of the case at bar, it was held that the defendant should be permitted to continue to sell biscuits without change of form, color or size from the characteristic biscuits sold by plaintiff. With respect to biscuits which reached the final purchaser in cartons no relief was granted because, as the court found, the defendant's cartons were so different from plaintiff's that no confusion was possible. With respect to biscuits sold out of the carton, as in hotels, restaurants, lunchrooms and boarding houses, these were required to be marked, tagged or labeled, but even as to this single requirement it was provided in the court's decree that the defendants should be

¹ This conclusion appears to be in conflict with the decision of Justice Brewer sitting as a Circuit Justice in *Centaur Co. v. Heinsfurter*, 84 Fed. 955 (C. C. A. 8).

relieved from marking, tagging or labeling such biscuits if after a fair trial this could not be done "except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons".

In the case at bar the District Court found (R. 1, p. 221):

"By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case [*i. e.* *Shredded Wheat Co. v. Humphrey Cornell*]. In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself cannot be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the Court."

and further predicated its decision upon the opinion of Judge Ward in the *Humphrey Cornell* case, *supra*, quoting as follows (R. 1, p. 201):

"Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed. 960, 967.

The court below has directed that an injunction issue which will end all competition in the business of selling biscuits of the characteristic form and shape, whether in or out of cartons, however the carton or individual biscuits may be marked, and regardless of the size or color of the biscuits.

With respect to the sale of biscuits without change of form, color or size the decision of the court below is in irreconcilable conflict with the decision of the Second Circuit in the *Humphrey Cornell* case. Upon the facts in this record the petitioner was entitled to dismissal of the complaint under the ruling in that case.

(2) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the 8th Circuit in *Cestor Co. v. Heinsfurter*, 84 Fed. 955 (C. C. A. 8; opinion by Circuit Justice Brewer) where the ruling in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, was applied to the use of the word "Castoria". The controversy in the *Singer* case arose immediately after the expiration of the patent, but in the *Castoria* case the plaintiff continued in the exclusive manufacture of Castoria for some ten years after the expiration of its patent and contended that during the time when the right to manufacture and sell was common it acquired a trade-mark in the name. Disposing of this contention Mr. Justice Brewer said:

"But this matter of time makes no difference. The word had become known as the name of the thing, and as such it could not be appropriated as a trade-mark.

"* * * As well might a manufacturer of flour claim a trade-mark in the word 'flour', as the manufacturer of 'Castoria' the trade-mark in that name."

Thus the right to individual appropriation, once lost, is gone forever. This principle was subsequently confirmed by this Court in *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 36, and *Saxlehner v. Wagner*, 216 U. S. 375, 381.

The court below held that upon patent expiration the petitioner was free to adopt the name, but because of delay and continued use of the name by respondent the case stands just as if there had been no patent (R. 3-A, p. 2087-88).

In its application of the rule of the *Singer* case, *supra*, to the facts in the case at bar the decision of the court below is in irreconcilable conflict with the decision of the Eighth Circuit in the *Castoria* case, in that it is predicated upon an alleged reappropriation of the name "shredded wheat" after the expiration of the patents (R. 3-A, p. 2088).²

(3) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.*, 235 Fed. 657, 667.

In that case the court held that where some dealers and other customers in toasted cornflakes understood those words alone as having a secondary meaning indicating Kellogg's products, relief only of a qualified character such as would prevent others from selling toasted cornflakes as those of Kellogg was permissible in a suit for unfair competition, and that unless the defendant was shown to have failed clearly and effectively to distinguish its product from Kellogg's no relief could be granted. Since the defendant had sold its toasted cornflakes in cartons distinctively marked, all relief was denied.

In the case at bar the court enjoined not only the use of the name which under the decision in the *Singer* case, *supra*, had come to designate the product which all could sell, but enjoined the sale of the product itself.

(4) The decision of the court below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Natural Food Co. v. Williams*, 30 App. D. C.

² The validity of the principle applied in the *Castoria* case is not questioned by the decision in *Centaur Co. v. Genesh*, 33 F. (2d) 985, decided in the Western District of Pennsylvania thirty years after Justice Brewer's decision, because in the later case it was found as a fact that *Castoria* is not and never was the product of the expired Pitcher Patent, although in the original *Castoria* case there was a finding that it was.

348, in that it grants a perpetual trademark in this name by injunction, although the registration of such trademark under the Trademark Act, of 1905 (33 Stat. 725, 15 U. S. C. A. § 85) was denied to respondent's predecessor in that case.

(5) The decision of the court below is in conflict with applicable decisions of this Court.

In *Warner & Co. v. Lilly & Co.*, 265 U. S. 526, chocolate was used in a medicinal preparation to give it a distinctive color and a distinctive flavor. The chocolate had no therapeutic value. The defendant was found to have been guilty of grossly unfair competition in attempting to imitate the appearance of the plaintiff's medicine so as to persuade dealers to sell its product as the plaintiff's. In dealing with this situation the Circuit Court of Appeals for the Third Circuit unconditionally enjoined defendant from using chocolate in its preparation to simulate the color of plaintiff's preparation. This Court reversed the decree, holding that the right to which the plaintiff was entitled was that of being protected against unfair competition, not of having the aid of a decree to create or support, or assist in creating or supporting, a monopoly of a preparation which everyone, including the petitioner, is free to make and vend. The court below was directed to confine its relief to the requirement of sales of the product in cartons appropriately marked to prevent confusion, deception and fraud.

This case and many others are but instances of a basic and controlling principle common to the law of trademarks and of unfair competition, declared in *Canal Co. v. Clark*, 13 Wall. 311, in *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, and in many other controlling decisions, which limits the defendant's liability and the plaintiff's right to relief in such cases to indemnity for or prevention of the wrongful sale of defendant's goods as the goods of plaintiff. Nothing of the kind is

Appeal, where it will be considered in the light of the authoritative decision of the Lord Justices sitting in the Privy Council.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain therein named a transcript of the record and proceedings herein, and that the order of said Circuit Court of Appeals for the Third Circuit reversing the decree of the District Court for the District of Delaware be reversed by this Honorable Court and that said decree of said District Court be affirmed, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, &c.

Dated: New York, N. Y., May 23, 1938.

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